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OFFICE OF PETITIONS

In re Application of
Aagaard, et al.
Application No. 10/008,077
Filed: November 8, 2001
Attorney Docket No. 01-602-US

ON PETITION

This is a decision on the petition under 37 CFR 1.137(b) pursuant to 37 CFR 1.137(f), filed May 20, 2003.

The petition is **DISMISSED AS INAPPROPRIATE**.

The record discloses that on November 8, 2001, the date of filing of the instant application, a Request and Certification under 35 USC 122(b)(2)(B)(i) was filed, certifying that "the invention disclosed in the attached **application has not and will not** be the subject of an application filed in another country, or under a multilateral agreement, that requires publication at eighteen months after filing."

Petitioner now requests under 35 USC 122(b)(2)(B)(ii) that the Request and Certification under 35 USC 122(b)(2)(B)(i) be rescinded and the application revived because this application became abandoned for failure to notify the Office within 45 days of the filing of a corresponding international or foreign application. In this regard, petitioner states that an international or foreign application corresponding to the instant application was filed on **November 8, 2001**, which date is **the same date as** the date of filing the instant application.

The instant nonprovisional application did not become abandoned as a result of the published international application filed on the same date as the present application. In this regard, 35 USC 122(b)(2)(B)(iii) states:

An applicant who has made a request under clause (i) but who **subsequently files, in a foreign country or under a multilateral international agreement** specified in clause (i), an application directed to the invention disclosed in the application filed in the Patent and Trademark Office, shall notify the Director of such filing not later than 45 days **after the date of the filing of such foreign or international application.** A failure of the applicant to provide such notice within the prescribed period shall result in the application being regarded as abandoned, unless it is shown to the satisfaction of the Director that the delay in submitting the notice was unintentional (emphasis added).

The facts of this case are that the subject application was filed on November 8, 2001, and the corresponding application was filed on November 8, 2001. The statute does not provide for the situation where a certification under 35 USC 122(b)(2)(B)(i) was made, despite the fact that an application was previously filed or filed on the same day in another country or under a multilateral agreement. The statute at 35 USC 122(b)(2)(B)(iii) only provides for revival in the situation where a certification was made under 35 USC 122(b)(2)(B)(i) at the time of filing the application and an application was **subsequently** filed in a foreign country without notifying the Office within 45 days of the filing thereof.

In view of the above, and since this application did not become abandoned pursuant to the provisions of 35 USC 122(b)(2)(B)(iii), a petition to revive under the provisions of 37 CFR 1.137(f) is inappropriate and must be dismissed.

As requested, the Request and Certification under 35 USC 122(b)(2)(B)(i) has been rescinded. A Notice Regarding Rescission of Nonpublication Request and Notice of Foreign Filing indicating a projected publication date of November 13, 2003 accompanies this decision.

The rules and statutory provisions governing the operations of the US Patent and Trademark Office require payment of a fee on filing each petition. See 35 USC 41(a)(7). Payment of the \$1,300 petition fee is acknowledged.

The application is being forwarded to the Technology Center 2600 for examination in due course.

Telephone inquiries regarding this decision should be directed to the undersigned at (703) 305-0272.

Cliff Congo

Cliff Congo
Petitions Attorney
Office of Petitions

Enc: Notice Regarding Rescission of Nonpublication Request
and Notice of Foreign Filing (2 pages)